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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 11

IGOR A. IVANOV, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR REHEARING

The United States petitions the Court to grant a rehearing in this case and modify its opinion and its decision. We limit our request to that portion of the decision which relates to the disclosure to defendants of the results of electronic surveillance relating to the gathering of foreign intelligence information, which term we use to include the gathering of information necessary for the conduct of international affairs, and for the protection of national defense secrets and installations from foreign espionage and sabotage.

We are seeking this relief because of concern that our prior submission may not have made sufficiently clear to the Court all the implications of the problem

and the adverse impact upon government intelligence activities in the field of foreign affairs which would result from the broad disclosure the opinion seemingly contemplates. In addition, the decision apparently rests upon the assumption that the electronic surveillance involved in gathering foreign intelligence information was illegal. In point 1 below, however, we contend that such gathering was legal.

In presenting this petition, we do not use the term "national security." We recognize that that phrase can be given a broad meaning covering such matters as organized crime and internal security. Our submission here is limited to the narrow category of the gathering of foreign intelligence information, *i.e.*, matters affecting the external security of the country, and where the Attorney General has expressly authorized the surveillance [1] and where he files a certificate that disclosure of the information would prejudice the national interest.[2] Within that narrow compass, we believe that the decision in these cases poses sufficiently serious problems to the protection of that security that

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[1] In our earlier brief in this case we advised the Court that in some instances the electronic surveillance involved had been instituted without the express approval of the Attorney General. Brief for the United States, p. 4,, n. 2. We do not seek rehearing with regard to those installations not expressly authorized by the Attorney General.

Accordingly, this petition is filed only in the case of *Ivanov*, No. 11, and only with regard to those surveillances expressly authorized by the Attorney General for the purpose of gathering foreign intelligence information.

[2] Cf. *United States* v. *Reynolds*, 345 U.S. 1. See also *Ex parte Quirin*, 317 U.S. 1, where this Court impounded the record on the basis of national security considerations. Journal of the Supreme Court for July 29, 1942, October Term, 1942, p. 2.

it should be modified to provide for *in camera* scrutiny by the district court before records of surveillance made in such gathering should be disclosed to defendants.

1. The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *.

It cannot be supposed that when this amendment was adopted it was directed against the collection of foreign intelligence information. The prohibition of the amendment is against "unreasonable searches and seizures." That which has long been practiced, by all nations, in the interests of self-preservation, cannot easily be regarded as unreasonable.

When the effect of the Amendment was limited to physical searches and seizures, there was little occasion to be concerned about its application to foreign intelligence information. The process of extending its application to communications, which has only recently culminated in the decision of *Katz* v. *United States,* 389 U.S. 347, has presented wholly new problems, for foreign intelligence activities often involve messages and communications, written and spoken. There are many instances in history, including the history of the United States, where the interception of messages has played an important role. The Zimmerman note of 1916 and MAGIC in 1940–1941, may serve as examples. The question is comprehensively discussed in D. Kahn, *The Code Breakers* (1968).

Never in our history has it been suggested that such activities were unconstitutional.

There was a time, in 1929, when Secretary Stimson closed the facilities for such work, as a matter of policy. D. Kahn, *supra,* at p. 360. However, as Secretary of War, he reestablished this work in 1940, and, under the authority of President Roosevelt and every succeeding President, such activities have been carried on ever since. The electronic surveillance to which we refer here was done under the explicit authority of the Attorney General, acting pursuant to authority delegated to him by the President in carrying out his duty to conduct foreign relations and to protect and defend the United States.

Congress in enacting the Crime Control Act of 1968 expressly recognized the President's authority to order electronic surveillance

> to protect the Nation against actual or potential attack or other hostile acts of a foreign power, or to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. * * *

Omnibus Crime Control and Safe Streets Act of 1968, § 2511(3) 82 Stat. 197, 214.[3]

[3] Since, in enacting the Crime Control Act of 1968, Congress determined that it did not wish to interfere with the President's power in this regard, the Act provides no requirement or procedure for obtaining a warrant to conduct electronic surveillance for the purpose of gathering foreign intelligence information.

Thus, both the Executive and the Legislative branches of the government, having great responsibilities in this area, have concluded that actions of the sort involved here are not "unreasonable," and thus not within the prohibitions of the Fourth Amendment. These determinations of coordinate branches of the Federal Government are entitled to great weight, even on a constitutional question. Moreover, we are dealing with the area of foreign relations. This Court has, of course, recognized that the "President also possesses in his own right certain powers conferred by the Constitution on him as Commander-in-Chief and as the Nation's organ in foreign affairs." *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103, 109. See the *Brief for the United States* previously filed in this case, pp. 4–8.

We, therefore, submit that the electronic surveillances involved which were authorized by the Attorney General were not illegal and that the government, accordingly, should not be required to make any disclosure to petitioner. We would be willing to submit the logs of the overheard conversations to a court for its *in camera* examination. From the nature of the premises subject to the surveillances at issue, such examination of the logs would make it clear beyond any doubt that the surveillances were being maintained solely to gather foreign intelligence information.

2. But even if the Court is not persuaded that it should rule here that the surveillances at issue were constitutionally conducted, we urge that disclosure to the defendant should not be required in this case.

In *Nardone* v. *United States,* 308 U.S. 338, 341, which involved wire-tapping, this Court stated:

> The burden is, of course, on the accused in the first instance to prove to the trial court's satisfaction that wire-tapping was unlawfully employed. Once that is established * * * the trial judge must give opportunity, however, closely confined, to the accused to prove that a substantial portion of the case against him was a fruit of the poisonous tree. * * *

In this case, petitioner has not met either of these burdens. Petitioner produced no evidence that the government employed any electronic surveillance. The problem here arises because Solicitors General have been meticulous in advising the Court of all instances of electronic surveillance which come to their attention, even when they are trivial and accidental. This has been because of the obligation on counsel for the government recognized by such cases as *Brady* v. *Maryland,* 373 U.S. 83, and the tradition of candor reflected in the statement of former Solicitor General Sobeloff quoted at page 87, n. 2, of that opinion. It is believed that these actions have been appropriate. Nevertheless, the great care taken to see that disclosure is made to the Court, even when the circumstances are trivial and accidental, should not lead to consequences which are so serious as to be out of proportion to the actual circumstances presented.

We do not quarrel with the general proposition that the government should come forward and disclose instances where a defendant has been overheard during the course of an electronic surveillance. We do submit, however, that the duty should not be an

absolute one. There should be some room for balancing the possible benefits to be derived from disclosure against the damage to the national interest. Here the question is when the government must disclose information to a defendant so that he may attempt to establish that its seizure was illegal and that it was used against him. In carrying out our duty to the Court, we have, under the general rule of *Brady* v. *Maryland, supra,* gone beyond *Nardone,* under which the government has no duty to come forward to bring a search and seizure to the defendant's attention. *Brady* v. *Maryland* does not, however, require the government to disclose irrelevant material to the defendant. Thus, in *Brady,* this Court said, p. 87, "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process *where the evidence is material* either to guilt or to punishment" (Emphasis added).

There would, therefore, seem to be no constitutional requirement that the government need disclose irrelevant overhearings to the defendant. In a situation involving the gathering of foreign intelligence information, we submit that the Court should adopt a test which balances the interests to be served by disclosure against the interests to be protected by nondisclosure.

Here, where it is clear from the nature of the premises subject to the surveillance that the surveillance was being conducted to obtain foreign intelligence information, we submit that the national interest should outweigh the possible interest of a defendant in examining material which the government and a

federal judge have determined is not even arguably relevant to his case.

The rule of disclosure is a good norm, a general rule of wide application; but it need not be universal. There is no need to accept "The tendency of a principle to expand itself to the limit of its logic," as then Judge Cardozo put the underlying problem.[4] All law, including constitutional law, involves the resolution of competing claims. Professor Freund has recently referred to "the great antinomies of our aspirations: liberty and order; privacy and knowledge; stability and change; security and responsibility."[5] In the classic phrasing of this Court: "All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached."[6] We submit that that point has been reached in this case.

3. The Court's opinion, as written, is broad enough to be applicable to another type of case, which was not actually before the Court in the presentations which were made to it. This is the situation where, during the course of gathering foreign intelligence information, a person who is or becomes a defendant in an ordinary criminal case is overheard merely by accident or happenstance, because he simply stumbles into it. In such cases, the logs are brief, the character

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[4] *The Nature of the Judicial Process* 51 (1921).

[5] Freund, *On Law and Justice* (1968).

[6] *Hudson County Water Co.* v. *McCarter*, 209 U.S. 349, 355.

of the premises involved shows the nature of the investigation, and a determination of irrelevancy can be quickly and clearly made.

This question is involved in two cases now pending before the Court on petitions for certiorari. These are *Clay* v. *United States,* No. 271, this Term, and *Mrkonjic-Ruiz* v. *United States,* No. 880, this Term, in both of which Additional Memoranda are being filed contemporaneously with this petition for rehearing.

There is real risk, we fear, that this important question may not have been adequately brought to the attention of the Court in the previous briefs and oral arguments, and that it may have been lost sight of in the process of disposing of the other problems presented. Consideration of the problem of disclosure in connection with electronic surveillance began in a purely domestic context, in the *Alderman* case, which was first argued on May 2, 1968. It was only after the argument there that certiorari was granted in the cases of *Ivanov* and *Butenko,* and these cases were included in the reargument which was held on October 14, 1968. It is true that *Ivanov* and *Butenko* involved the gathering of foreign intelligence information. But the question was considered in the context of the *Butenko* and *Ivanov* cases themselves, in both of which there were surveillances directed *against* the two defendants then before the Court.[7]

[7] The Court's decision as to standing removes any problem of prejudice to the national interest from the case as far as Butenko is concerned, since his conversations were heard only at his office.

There was no case then before the Court, on the merits, involving solely the situation which now gives great concern, and no argument was specifically directed to that situation. This is where the individual overheard was not *himself* the subject of surveillance, but where his conversation was heard incidentally and accidentally, and wholly irrelevantly, in connection with an investigation designed to obtain foreign intelligence information.

The Court's opinion, however, is sweeping, and is, in terms, applicable to all cases, no matter what the underlying situation. But the problem has many facets, and we submit that some of these require further consideration from the Court. As we point out in the Additional Memorandum which we are filing in *Mrkonjic-Ruzic* v. *United States,* No. 880, this Term, the result of the decision as it now stands "is, in practical terms, to provide the defendant with immunity from prosecution for all crimes past, present or future"—and, we may add, to point the way for the well-advised person to obtain such immunity by simply making a telephone call. This does not seem to be either a necessary or a desirable result.

We urge that the opinion in the *Alderman* case be modified so as to allow an exception under which disclosure may be made to the court alone where the nature of the premises involved is such as to make it plain that the investigation involved the gathering of foreign intelligence information, and where the Attorney General files a certificate that disclosure of the information would prejudice the national interest.

In such cases, if the court finds that the material is not arguably relevant to the pending prosecution, no further disclosure should be required.

In the alternative, we suggest the following for the consideration of the Court:

When the government instituted its practice of voluntarily disclosing to the Court instances of electronic surveillance, it did not envisage the possibility that disclosure might be required in cases where (1) the defendant himself was not the subject of the surveillance, but inadvertently was overheard during a foreign intelligence surveillance, and (2) his overheard conversations bore no conceivable relevance to the issues in the criminal case. After more careful examination of the concrete situation, we do not believe that the government's duty of candor to the Court required the disclosure of such eavesdropping, and it is our judgment that, within the rule of *Brady* v. *Maryland, supra*, it was unnecessary. To whatever extent we did consider the possibility of such disclosure, we assumed that, because of its impact upon the gathering of foreign intelligence information, we would not be required to make information available to the defendant unless the trial court had first concluded in an *in camera* inspection that it was at least relevant to the issues in the case.

With respect to this limited category of information—conversations by a defendant which are overheard during a foreign intelligence surveillance as to

which he was a total outsider, where he simply stumbled in, and which have no possible relevance to the criminal case—the considerations noted above lead us to think that it would be appropriate for us to modify our prior practice of informing the Court about the existence of such eavesdropping. We would continue to bring to the Court's attention all instances of illegal electronic surveillance that are directed against the defendant or contain any possibly relevant information in the criminal case.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

MARCH 1969.

CERTIFICATE OF COUNSEL

Pursuant to Rule 58(1) of the Rules of this Court, I hereby certify that this petition for rehearing is presented in good faith and not for delay.

ERWIN N. GRISWOLD,
Solicitor General.

U.S. GOVERNMENT PRINTING OFFICE: 1969